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IN THE

Supreme Court of the United States

October Term, 1950
No. 453

RAY L. GARNER, *et al.*,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES, *et al.*,

Respondents.

Respondents' Petition for Rehearing or Reconsideration and for Modification of the Opinion of the Court.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This matter is here on certiorari to the District Court of Appeal. The District Court of Appeal concluded that the petitioners stated no cause for the issuance of an alternative writ of mandate requiring the respondents to appear before the Superior Court and plead the facts upon which they based their refusals to restore the petitioners to the positions in the city's employ from which the petitioners asserted they had been discharged. Under the *judgment* of this Court, the order of the Superior Court is not disturbed.

The respondents agree with the statements in the *opinion* of this Court (1) that the requirement for the oath and the requirement for the affidavit are properly to be separately considered; (2) that "*scienter*, is implicit in each clause of the oath"; and (3) that the requirement of the oath as so construed, and the requirement of the affidavit, is each separately a validly required condition of public employment under the circumstances here presented.

However, in its opinion this Court further says: "We assume that if our interpretation of the oath is correct the City of Los Angeles will give those (fifteen) petitioners who heretofore refused to take the oath an opportunity to take it as interpreted and resume their employment." This observation appears to overlook the fact that those fifteen were discharged for a separately stated additional cause which was identical with the cause for which the petitioners Pacifico and Schwartz were discharged.

Since the judgment as to Pacifico and Schwartz was affirmed, without any qualifying observation in the opinion of the Court, the respondents assume that any future examination of the cases of the fifteen petitioners, either by the respondents or in the state courts, would necessarily result in a conclusion adverse to the fifteen—the conclusion that a renewed inquiry into the facts of their discharges for failure to take the oath would be of no avail, since their discharges for failure to execute the affidavit would stand in any event.

Nevertheless, the respondents do not desire that there be any basis for even a suspicion that they have not been

amenable to the wishes of the Court, and they urge that no room should be left for any contention that the opinion of this Court would support a renewal of the claims of those fifteen.

For these reasons, the respondents respectfully submit that the opinion of the Court should be reconsidered, either upon the Court's own motion or upon rehearing, and that upon such reconsideration the opinion should be modified to the following effect:

(a) That the discharge of each of the petitioners is sustained and affirmed for the cause separately stated in each case that he failed to execute the required affidavit.

(b) That the discharge of the fifteen petitioners, other than Pacifico and Schwartz, be further sustained and affirmed for the cause separately stated in each case that he failed to execute the required oath, upon the assumptions that *scienter* is implicit in each clause of the oath and that the oath was so construed and administered by the respondents, and upon the further assumption, there being nothing in the record to the contrary, that each of those fifteen petitioners so understood the oath.

The respondents submit that such modification should be effected for the following reasons:

1. To remove the possible inconsistency between the judgment and the opinion. The judgment of this Court affirms the orders below as to the discharges of Pacifico

and Schwartz. The discharges of those petitioners were based solely upon their refusals to execute the required affidavit. Each of them took and subscribed to the oath and, therefore, neither the validity nor any question of interpretation of the oath was involved in their cases. Each of the other petitioners was discharged for an identical stated cause—his failure to execute the affidavit. Additionally and separately, each of them was discharged for his failure to take the oath. Consequently, even if this Court had held the oath requirement to be entirely invalid, the discharge of each of those fifteen petitioners would have been sustained in consonance with the judgment of the Court as to Pacifico and Schwartz.

(It may be observed that the opinions of two of the Justices who did not agree with the opinion of the Court are not entirely inconsistent with a judgment so framed: the opinions of Mr. Justice Burton and Mr. Justice Frankfurter agree with the judgment as to Pacifico and Schwartz; on the other hand, the opinions of Mr. Justice Douglas and Mr. Justice Black appear to turn entirely upon their views as to the oath.)

2. To harmonize the decision with the status of the action in the courts of California.

It may be helpful to review the history of this matter, emphasizing certain facts, and to relate certain facts which, although they do not appear in the record, may serve to assure the Court that its assumptions as to the city's interpretation of the oath are well founded.

History of the Case.

The City of Los Angeles is a home-rule municipal corporation organized under a freeholders' charter according to the provisions of Article XI, Section 8 of the Constitution of California. Amendments to that charter are effected according to determinations at general elections of a majority of the city's voters. The approval of the legislature to such amendments is required, but amounts to no more than a ratification.

Under this constitutional system the people of the city, through their elected legislative representatives and their elected executive, have plenary power over personnel matters, free from any general control by the State Legislature. This power is complete and in its exercise in detail no express charter authority is required: the Los Angeles charter provisions in this field are limitations upon and are not grants of power.

City of Grass Valley v. Walkinshaw, 34 Cal 2d 595, 598, 599;

Ainsworth v. Bryant, 34 Cal. 2d 465, 469;

Butterworth v. Boyd, 12 Cal. 2d 140, 146, 147 150.

Charter Section 432 therefore is a limitation upon the city's power rather than a grant of power, and Ordinance No. 94,004 is an enactment by the people of the city under their constitutionally derived authority rather than according to authority contained in Charter Section 432. The state question in this connection is not whether the ordinance is authorized by the charter section, but whether the charter section in any way restricts the city's authority to enact the ordinance. That state question of course was

answered in the negative by the effect of the state court decisions.

The constitutional question, on the other hand, is whether the terms of the charter section repel at the outset any inquiry as to whether or not the ordinance oath requirement may constitute a bill of attainder or an *ex post facto* law. That question, by the judgment and opinion of this Court, is answered in the affirmative.

The detailed facts of the case here appear only from the petition to the Superior Court. Whether or not they are actually the facts would have appeared under the state practice, if the state court had thought that the petition stated a cause of action, from the respondents' answer and from the evidence thereafter adduced upon trial. The state court, however, thought that no cause of action was stated: it issued no writ, the respondents were not served with process, and the respondents therefore have never been before any trial court but have appeared herein merely as respondents on appeal. (*Cf. Wilson v. Los Angeles County Civil Service Commission*, 95 Cal. App. 2d 51, 212 P. 2d 265.) The facts asserted in the petition, discussed in the briefs, and related here, should be considered with this procedural history in mind.

Each of the seventeen petitioners was discharged for causes which were specifically separately stated in his notice of discharge. One of these causes was common in each of the seventeen cases, including the cases of Pacifico and Schwartz—that he failed to execute the required affidavit; a second was separately and *additionally* stated in the cases of the fifteen petitioners other than Pacifico and Schwartz—that he failed to take the required oath. In nine cases, including the cases of Pacifico and Schwartz, an additional count of insubordination was stated, that the

employee failed to execute the affidavit as instructed by his appointing officer. (This fact was not discussed in the briefs, and since seven of the Justices thought the stated cause of failure to obey the *ordinance* directive for execution of the affidavit to be beyond attack, and since the other two Justices did not examine that cause in their dissenting opinions, it seems unnecessary to comment further upon it.)

Before he was discharged and within the time fixed by the ordinance for compliance, each of the petitioners was separately solicited by the city for his reasons for delay and possible refusal, and each of the petitioners but one handed the city an extended statement of his views and reasons in attempted justification of his position. The correspondence in only one of the seventeen cases, that of Garner, was printed in the record. Further reference to this and to the whole record will be made hereafter.

Following his discharge for each of the several separate causes stated as to him, each of the petitioners demanded a review and hearing by the city's Board of Civil Service Commissioners, and an extended hearing, in which the petitioner testified at length, was held in each case. The record of these hearings was never prepared or submitted to the trial court and appears nowhere in the record before this Court. Comment on this fact will also be hereafter made.

The discharge of each petitioner was sustained by the Board of Civil Service Commissioners upon each of the causes stated in his case, and the petitioners then applied to the Superior Court for an alternative writ of mandate requiring the city forthwith to reinstate them in their positions or to come forward and assert the facts of the case. As we have heretofore noted, the refusal of the Superior

Court to issue the alternative writ, and the failure of the petitioners to come forward with the record before the Civil Service Commission or otherwise to improve their petition, resulted in the case proceeding up to this Court without the respondents ever joining issue or otherwise becoming subject to the jurisdiction or amenable to any judgment of the Superior Court.

This procedural history should not be overlooked because upon any trial of the facts the following would appear:

1. The city consistently administered the ordinance upon the basis that *scienter* is necessarily implied in the various undertakings contained in the required oath.

2. Contrary to the statements contained in the letters from Garner [Printed Record, page 22; Certified Record, page 32], Mann [Certified Record, page 40], Pacifico [Certified Record, page 43], and Schwartz [Certified Record, page 49], neither the City Attorney nor any other responsible officer of the city made any statement that enforcement of the ordinance or discharges for failure to comply therewith would be postponed after January 6, 1949. On the contrary, the uniform administrative position was that the ordinance would be enforced, like any other ordinance, unless its enforcement were enjoined, and in a connected suit for an injunction brought by the petitioner Garner [R. 22] the city successfully opposed an application for such an injunction.

3. Each of the petitioners understood *scienter* to be implied in the oath, and none of them in his pre-discharge justification, or in his hearing before the Board of Civil Service Commissioners, made any claim to the contrary or suggested that his refusal to take the oath was based upon any doubt that the oath implied *scienter* in each relevant connection.

4. Under the retirement provisions of the charter, one who has been in the service of the city for more than ten years may be placed upon a retirement pension when he reaches the age of 60, even though he was discharged from the city's service, and even though more than half of the retirement pension is paid from tax money. Retirement upon application in such cases is a matter of right under the charter. One who is so retired is ineligible to resume his former position, and one who has been discharged from his former position is held by his retirement to have waived claims that such discharge was invalid under the charter.

After their discharges were sustained by the Civil Service Commission one of the petitioners, Garner, applied for voluntary retirement; and nine of them drew down their contributions to the city's retirement funds. An employee who so withdraws his contributions is also held under state law to have voluntarily finally separated himself from the service of the city and to have waived any claims that he had been suspended, laid off or discharged in violation of the provisions of the charter in such connection.

5. Other factual and procedural claims in defense, available under state law, would have been urged by the city if it had been served with process herein.

For these and other reasons, a reversal of the order of the Superior Court by the District Court of Appeal would not peremptorily have directed that any specific relief be accorded the petitioners, but instead would simply have directed the Superior Court to issue its alternative writ of mandate and thereafter to proceed to trial and to such judgment as might then appear to be required.

Furthermore, under state practice the Superior Court does not finally issue a peremptory writ of mandate directing the reinstatement of a discharged petitioner, at least where all charter required procedures were followed in effecting the discharge, but instead directs the Board of Civil Service Commissioners to reopen its inquiry and hearing and to proceed to its own determination in accordance with the applicable principles of law declared by the Court in its judgment and writ. This procedure is particularly necessary because if a redetermination by the Board of Civil Service Commissioners results in its order for reinstatement of the employee, various problems arise which are properly to be determined, at least in the first instance, by the Commission, such as: (1) questions of just what is the position to which the employee is to be restored; and (2) questions of calculation of back salary to be paid and deductions therefrom on account of outside earnings in the interim.

In view of these propositions, we urge that it should not appear from the opinion of this Court that the respondents should forthwith initiate a further administrative review of the cases of the fifteen petitioners who refused to take the oath, and in this connection, we urge two additional propositions which also have not heretofore been emphasized in our briefs:

1. Pursuant to paragraph 8 of Rule 38, the petitioners requested the respondents to stipulate to a short printed record. The respondents complied, and the printed record therefore omits, among other things, the rather voluminous correspondence between the city and the petitioners other than Garner. The respondents submit that the entire record amply supports the conclusion that none of the

fifteen urged the lack of expressly stated *scienter* in the oath as his reason for refusing to execute it, and that none of them had any doubt that *scienter* was implicit in the oath. In fact, the reasons given by the fifteen for refusal to take the oath were for the most part the claims of bill of attainder and *ex post facto* which have been completely rejected by the opinion of the Court and as well by the opinion of Mr. Justice Frankfurter.

2. The respondents submit that the Board of Civil Service Commissioners was the tribunal before which the petitioners should have first raised the claim of deprivation of due process, or denial of the equal protection of the laws, as based upon the omission from the oath of express language of *scienter*. Since the petitioners saw fit not to bring into the Superior Court the record before the Board of Civil Service Commissioners, and since they alleged no facts in their petition to the Superior Court to show any such deprivation or denial upon that basis, it might well be conclusively assumed by this Court either that no such claims were made before the Board of Civil Service Commissioners, or that they were made there without factual support—that each of the petitioners expressly conceded there that he understood the oath to imply *scienter*, and that his reasons for refusing to take it had nothing to do with any doubt in his mind either as to his assertions of past activity or as to his undertakings for the future. Such assumptions would seem further warranted because each of the petitioners was represented before the Board of Civil Service Commissioners by counsel—the same counsel who argued their cases before this Court [R. 25]—*and because this issue was not thereafter sought to be raised by any of the petitioners either in the District Court of Appeal or before this Court.*

The Respondents' Administrative Interpretation of the Oath Provisions of the Ordinance.

We have heretofore assured the Court that its assumptions as to the respondents' interpretation of the oath are well founded. In the respondents' view, throughout, *scienter* is as implicit in relevant provisions of this ordinance oath as it is in any other oath, as, for example, the traditional oath of a witness that he will tell the truth, the whole truth and nothing but the truth, and these implications, in the view of the respondents, are further compelled by consideration of the stated and implicit purposes of the ordinance and of the oath provisions thereof.

The determination of the city's officers that no one should be misled is a matter of record [R. 21, 22] and is noted in the opinion of this Court. So far as we have been able to ascertain, none of the petitioners made the inquiry solicited of him from any officer of the city: certainly, no such inquiry was made of counsel for the city.

The respondents construe the words "affiliated with" in the ordinance oath to be intended to reach those sophists who deny record enrollment in a proscribed organization, but continue to give it obedience and active support. They construe those words to connote a purposeful and knowing effectuation of a connection with an organization of the described character, though such connection be other than a record enrollment, as by purposely accepting and following its orders and other discipline, working actively with it to accomplish its illegal aims, knowing their nature, and the like. In the respondents' conception, "affiliation" with a described organization is a question of fact to be established as such in each case as it may arise.

No other conceptions, so far as counsel have been able to ascertain, have been described by the respondents in

answer to any pertinent inquiry. There were only a few cases where the employee was concerned that he might be swearing to something that he could not know, and those employees' doubts were resolved by advice that *scienter* was implicit in the oath provisions as to membership or affiliation. Doubts were suggested also by employees who were members of the Seventh Day Adventists denomination, or who were members of Jehovah's Witnesses, and by representatives of each of those sects, as to whether or not the oath implied an obligation to bear arms in defense of the country. Those doubts were resolved by appropriate interpretations, and in each such case the employee took the oath.

The Effect of the Judgment Here Upon the Effectuation of the Ordinance in the Future.

Cases involving claims of applicable constitutional limitations have important effects in two phases:

1. Their effect upon the claims directly involved;

2. Their effect in the future application of the statute, ordinance or regulation concerned.

Where few are affected this Court may refuse review or may find significant in its determination the fact that few are affected (*American Communications Association v. Douds*, 339 U. S. 382, 397, 94 L. Ed. 925, 943). Here, the cases of only seventeen out of 29,000 city employees are directly presented, and in only two other cases was there a refusal to sign either the oath or the affidavit. Since the petitioners failed to raise the due process issue of *scienter* by appropriate factual allegations, since they otherwise declined invitations to improve their cases either before the Board of Civil Service Commissioners or in

their petition to the Superior Court, and since they did not raise that issue even in argument, the respondents submit that they are clearly not entitled at this late date to revitalize their cases on that issue in any renewed examination before the Board of Civil Service Commissioners or the state court. Such proposals could serve no large purpose unless the interests of others than the fifteen were also involved.

But no other interests are involved. On December 29, 1950, an amendment to Ordinance No. 94,004 became effective by which the oath required therein is the same oath required of all state employees by Sections 3100 to 3105 of the Government Code of the State of California. (See Appendix 4 to our respondents' brief herein.) While *scienter* is implicit, rather than explicit, in the new form of the oath as regards future membership, provision is made for the statement of exceptions as to past membership, and in any event, no case will arise in the future involving a failure to take the form of oath required of the petitioners here.

Under these circumstances, this case may well be treated as one where a few, advised by counsel, have failed either by factual allegations or in argument to raise the only constitutional question which seems to this Court to admit of any debate.

Questions may indeed arise in the future as to whether or not an employee committed perjury or swore falsely when he took the oath in the form required of these petitioners. The respondents, however, have never supposed that either perjury or a violation of the oath would appear by mere proof of membership in or affiliation with a proscribed organization, but rather have recognized that it would have

to appear in either case that the employee knew when he was a member that the organization was one which advocated or taught the overthrow by force, violence or other unlawful means of the Government of the United States of America or of the State of California, or that it would have to appear, if the employee was innocent of the organization's purposes when he became a member, that he nevertheless continued his membership after acquiring knowledge of the organization's aims.

However that may be, such problems may be determined when they are presented: they cannot be presented in the cases of the petitioners. Theirs are cases involving initial compliance, and if they still desire city employment and can truthfully take the required oath in its present form with the understanding that *scienter* is necessarily implied therein, all they need do (as suggested in our respondents' brief, page 53), is to come forward with an application for employment and qualify therefor on the same basis as does any other applicant. The undertaking for the future thus required of them will not disturb the most conscientious in this world of reality. A Tom Sawyer organization may withhold its aims and secrets until the blood brother is sworn as a member: an organization dedicated to violent revolution does not admit anyone to membership until it is satisfied of his zeal for its aims and of his subjection to blind obedience. One thus initially qualified could hardly complain that the day and the hour when the blow would be struck were not revealed to him before he pledged his obedience.

Conclusion.

In order that the opinion of this Court may be entirely consonant with its judgment and with the facts presented, the respondents submit that the opinion should be modified as above suggested.

Respectfully submitted,

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Assistant City Attorney,

A. L. LAWSON,
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and

ALAN G. CAMPBELL,
Deputy City Attorney,

Attorneys for Respondents.

Certificate of Counsel.

I hereby certify that I am one of counsel for the respondents herein, and that I am a member of the bar of this Court. The within petition for rehearing is presented in good faith and not for delay.

Dated: June 18, 1951.

ALAN G. CAMPBELL.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of June, A. D. 1951.

6-18-51—60